Wong Brother's Building Construction v Taman Equine (M) Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — SUIT NO 22C-10–05 OF 2014
SEE MEE CHUN J
5 JUNE 2015

Companies and Corporations — Directors — Powers — Whether instructions given by executive chairman/managing director of defendant company to third party bound defendant — Director who managed defendant and was its decision-maker instructed plaintiff to carry out renovation work on two lots of land belonging to defendant — Defendant with full knowledge of instructions kept mum for years on claims submitted by plaintiff for renovations done — Whether defendant could subsequently claim renovation was personal arrangement between plaintiff and director and did not bind defendant — Whether rule in Royal British Bank v Turquand applied such that director's instructions bound defendant

The first and second defendants, which were related companies, had appointed the plaintiff to construct and complete several projects. The work done by the plaintiff included the renovation of two lots of land ('the lots') owned by the first defendant and which were used by the third defendant ('D3') as his private residence during the time he was executive chairman and director of the defendants. D3 surrendered the lots back to the first defendant after he resigned from his posts. D3, who also owned a company named Subur Ehsan ('Subur'), was a decision-maker in the awarding of projects by the first defendant ('D1') and he had been instrumental in awarding the plaintiff tens of millions in value of projects. In answer to the plaintiff's instant monetary claim for work done to renovate the lots, the defendants contended that the instruction to renovate the lots was a personal request to the plaintiff from D3 and did not bind the defendants. They said either D3 or Subur ought to be liable for the renovation claim. D1 had never represented to the plaintiff that D3 had no authority to give any representation on its behalf. The plaintiff testified that D1 never at any time raised any objection to the claims it had submitted for the renovation work done on the lots and that it was only when it made a formal demand for the outstanding amount that the defendants denied responsibility and told the plaintiff to make its demand to D3.

Held, allowing the claim:

(1) D3's standing as the one who managed and ran the company, the decision-maker and practically the number one guy was such that any instruction from him amounted to coming from the defendants and binding on them. The fact of D3 being allowed by D1 to occupy the lots

showed it to be used by D3 in his capacity as chairman and director, more so when he surrendered the lots back to D1 upon his resignation (see para 14).

(2) The evidence showed that the defendants were aware of D3's instructions to the plaintiff to carry out the renovations on the lots but never objected to it. The defendants made no demand in writing to D3 for the renovation costs. They took on the responsibility for payment and only objected a good six years after the instructions were given and it came about after D3 had left the company. When the plaintiff sent its claim to the defendants, they did not reply to say they were not processing the claim on the ground D1 had never appointed the plaintiff to carry out the renovation work. The fact of the defendants not agreeing to the claim by not recording the same in their books was their internal procedure. This was an appropriate case where the rule in *Royal British Bank v Turquand* [1843-60] All ER Rep 435 applied. Proper instructions had been given and the plaintiff was not imprudent such that the rule in *Turquand* could not be invoked (see paras 15–17).

(3) The plaintiff's letters to Subur regarding its claim, without more, did not render Subur liable for the renovation work. The plaintiff's witness, PW2, testified that the plaintiff sent the letters to Subur on the defendants' instructions; he did not know why but followed the instructions hoping for payment at the soonest. The evidence showed that the plaintiff had been sending its claims first to D1, which was consistent with its position that the defendants were liable, and it was only when asked by the defendants to send the claim to Subur did it do so. There was otherwise no reason for it to do so. There was also no evidence that Subur belonged to D3 (see paras 19–20).

[Bahasa Malaysia summary

Defendan-defendan pertama dan kedua, yang mana adalah syarikat yang berkaitan, telah melantik plaintif untuk untuk membina dan menyiapkan beberapa projek. Kerja yang dilakukan oleh plaintif termasuk pengubahsuaian dua lot tanah ('lot-lot tersebut') yang dimiliki oleh defendan pertama dan yang mana diguna oleh defendan ketiga ('D3') sebagai tempat tinggal peribadi semasa dia adalah pengerusi eksekutif dan pengarah defendan-defendan. D3 menyerahkan kembali lot-lot tersebut kepada defendan pertama selepas dia meletakkan jawatan daripada jawatannya. D3, yang juga memiliki syarikat yang dikenali sebagai Subur Ehsan ('Subur'), adalah pembuat keputusan dalam mengawardkan projek-projek oleh defendan pertama ('D1') dan dia telah memainkan peranan penting dalam mengawardkan plaintif berpuluh-puluh juta dalam nilai projek-projek. Dalam jawapan kepada tuntutan wang oleh plaintif untuk kerja yang telah dijalankan untuk mengubahsuai lot-lot tersebut, defendan-defendan berhujah bahawa arahan untuk mengubahsuai lot-lot tersebut adalah permintaan peribadi kepada plaintif oleh D3 dan tidak

mengikat defendan-defendan. Mereka menyatakan sama ada D3 atau Subur patut bertanggungjawab untuk tuntutan pengubahsuaian. D1 tidak pernah memaklumkan kepada plaintif bahawa D3 tidak mempunyai kuasa untuk memberi apa-apa representasi bagi pihaknya. Plaintif memberi keterangan bahawa D1 tidak pernah pada bila-bila masa membangkitkan apa-apa bantahan kepada tuntutan yang ia serahkan untuk kerja-kerja pengubahsuaian yang telah dilakukan ke atas lot-lot tersebut dan bahawa ia hanya apabila ia membuat permintaan formal bagi jumlah tertunggak bahawa defendan-defendan menafikan tanggungjawab dan memberitahu plaintif untuk membuat tuntutannya kepada D3.

Diputuskan, membenarkan tuntutan:

(1) Pendirian D3 sebagai orang yang menguruskan dan mengendali syarikat tersebut, pembuat keputusan dan sebenarnya orang nombor satu adalah bahawa apa-apa arahan daripadanya merupakan seperti arahan yang datang daripada defendan-defendan dan mengikat mereka. Fakta bahawa D3 dibenarkan oleh D1 untuk menduduki lot-lot tersebut menunjukkan bahawa ia adalah untuk digunakan oleh D3 dalam kapasitinya sebagai pengerusi dan pengarah, lebih lagi apabila dia menyerahkan kembali lot-lot tersebut kepada D1 selepas peletakkan jawatannya (lihat perenggan 14).

(2) Keterangan menunjukkan bahawa defendan-defendan sedar mengenai arahan-arahan D3 kepada plaintif untuk menjalankan pengubahsuaian atas lot-lot tersebut tetapi tidak pernah membantah kepadanya. Defendan-defendan tidak membuat apa-apa tuntutan bertulis kepada D3 untuk kos pengubahsuaian. Mereka menanggung tanggungjawab bagi bayaran dan hanya membantah enam tahun selepas arahan-arahan diberikan dan ia berbangkit selepas D3 telah meninggalkan syarikat. Apabila plaintif menghantar tuntutannya kepada defendan-defendan, mereka tidak menjawab untuk menyatakan yang mereka tidak memproses tuntutan tersebut atas alasan D1 tidak pernah melantik plaintif untuk menjalankan kerja pengubahsuaian tersebut. Fakta bahawa defendan-defendan tidak bersetuju kepada tuntutan dengan tidak merekodkannya dalam buku mereka adalah prosedur dalaman mereka. Ini adalah kes yang wajar di mana peraturan dalam kes *Royal British Bank v Turquand* [1843-60] All ER Rep 435 digunapakai. Arahan yang betul telah diberikan dan plaintif adalah bukan tidak berhemat sehingga peraturan dalam kes *Turquand* tidak boleh dibangkitkan (lihat perenggan 15–17).

(3) Surat-surat plaintif kepada Subur berkaitan tuntutannya, tidak mengakibatkan Subur bertanggungjawab untuk kerja-kerja pengubahsuaian. Saksi plaintif, PW2, memberi keterangan bahawa plaintif menghantar surat-surat tersebut kepada Subur atas arahan

defendan-defendan; dia tidak tahu mengapa tetapi mengikut arahan-arahan tersebut dengan harapan mendapat bayaran dengan segera. Keterangan menunjukkan bahawa plaintif telah menghantar tuntutannya terdahulu kepada D1, yang mana adalah konsisten dengan kedudukannya bahawa defendan-defendan adalah bertanggungjawab, dan ia hanya apabila ditanya oleh defendan-defendan untuk menghantar tuntutan tersebut kepada Subur barulah ia berbuat sedemikian. Oleh itu tidak ada alasan untuk ianya berbuat sedemikian. Juga tidak terdapat keterangan bahawa Subur dimiliki oleh D3 (lihat perenggan 19–20).]

Notes

For a case on powers, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 407.

Cases referred to

Abdul Mohd Khalid bin Hj Ali & Ors v Dato' Hj Mustapha Kamal & Anor [2002] MLJU 564; [2003] 5 CLJ 85, HC (refd)

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465, FC (refd)

Royal British Bank v Turquand [1843-60] All ER Rep 435 (refd)

Mohamed Ibrahim bin Mohamed (Fazlin Illani bt Ibrahim with him) (Fazlan Alaudin & Izasuhana) for the plaintiff.

Selva Mookiah (Selva Mookiah & Assoc) for the first and second defendants.

See Mee Chun J:

INTRODUCTION AND BACKGROUND FACTS

[1] The plaintiff was appointed by D1 and D2 as a contractor for the construction and completion of several projects ('the projects') as set out in para 5 of the amended statement of claim. The details of two projects relevant to this claim are 'building homes 'Townhouse' 2 levels containing 112 units totaling 56 residential units on the ground floor of type A and 56 residential units on level 1 of type B on sublot PT 39 625 Mukim Petaling, Petaling District, Selangor (1st project) and 'build and improve (*menambah baik*) Lot 27 and 28 (2nd project)'. Lot 27 and 28 are part of the 112 units in the first project.

THE PLAINTIFF'S CLAIM

[2] The plaintiff now claims for the cost of the second project of RM538,276.78 from D1 and D2 ('the defendants') premised on D3's instruction. The plaintiff's claim against D3 who is pleaded as being a former director of the defendants had been struck out.

[3] According to the plaintiff's account the amount outstanding to it is RM1,316,115.46 while the defendants account shows it to be RM700,207.03 which amount excludes the cost of the second project.

AGREED FACTS AND COUNTERCLAIM

[4] The agreed facts in Bundle D are that arising from negotiations between the plaintiff and defendants it was agreed from January 2010 the defendants would pay by cash and contra of properties developed by D1 and if by contra there would be a contra agreement. By way of contra the plaintiff's nominee WB Realty bought three properties by the execution of three sale and purchase agreements dated 10 June 2010 ('S&Ps') for which the balance purchase price due is RM807,902. No contra agreement was signed.

[5] Defendants have thus filed a counterclaim for the amount due. Consent judgment in respect of para 43(b)(i) of the defendants statement of defence and counterclaim was entered into where the plaintiff and/or WB Realty would pay D1 RM107,694.97 being the balance purchase price of the contra property (RM807,902) less the amount the defendants say is due to the plaintiff (RM700,207.03).

ISSUE

[6] The trial therefore proceeded on the plaintiff's claim for second project of RM538,276.78 and late interest payment of 5% of RM77,631.65 commencing from 1 January 2010 and on the defendants counterclaim on interest of 12% from 8 July 2013 up till date of settlement as stated in S&Ps.

[7] The primary issue is whether the defendants are liable to pay for second project for which the plaintiff has to prove D3's instruction for it to renovate Lot 27 and 28 binds the defendants. In turn the defendants contended this was a private arrangement between the plaintiff and D3 for which D3 or a company called Subur Ehsan ('Subur') owned by D3 ought to be liable.

[8] The plaintiff had two witnesses, Mr Lin Hang Yang (PW1, D1's former group manager and witness statement marked as WSP1) and Dato Wong Yoon Fah, PW2, director in the plaintiff and WB Realty and witness statement marked as WSP1). Witnesses for the defendants were Mr Chin Cheng Lin (DW1, Senior Manager — Legal and witness statement marked as WSD1) and Ms Angeline Loo Leong Phaik (DW2, Financial Controller and witness statement marked as WSD2).

A LIABILTY OF THE DEFENDANTS TO PAY AND WHETHER D3'S INSTRUCTION BINDS THE DEFENDANTS

D3's position in the defendants

B **[9]** It must first be established who D3 is in the scheme of things. It is an agreed fact the defendants are related companies and subsidiaries under Global Oriental Bhd ('Global'). The evidence of DW1 and DW2 is that D3 was executive chairman ('chairman') and director in the defendants and that D3 resigned as chairman on 10 October 2008. Although PW1 had initially stated C D3 was managing director of D1 and then said he knew D3 was chairman, to him D3 was the 'boss'. PW2 had also said D3 was MD of D1 as he is managing the company and he didn't know D3 was chairman. What is relevant is D3's hierarchy in the defendants. D3 was the superior officer to both DW1 and D DW2. DW1 had disagreed D3 is the No 1 guy in the defendants as he manages and runs the company. To the question 'And yet he is superior' he replied 'the board of directors' (pp 70–71, notes of proceedings ('NOP')). This answer of managing and running the company shows D3 to be yielding authority and a superior officer in the defendants. There was also the evidence of DW2 that E 'D3 is No 1 in the company but there is a board of directors', her agreement to the suggestion that whatever instruction D3 gave will be binding on the company (both in p 88, NOP), D1 had never represented to the plaintiff D3 has no authority to give any representation on its behalf (p 90, NOP) and that D3 is one of the decision makers on award of projects by D1 (p 91, NOP). F Although DW2 did say D3 gave the instruction in his personal capacity the basis for such a conclusion was she had never recorded it as part of the company's projects nor the amount outstanding. In the eyes of PW2 D3 was managing the company and D3 had given the plaintiff tens of millions of value of projects.

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D3's occupation of Lot 27 and 28

[10] According to PW2 Lot 27 and 28 is owned by D1 and is part of the 112 units for first project. This is confirmed by DW1 and DW2 who both said it H was owned by D1 and used as the private residence of D3 and surrendered back to D1 after his resignation. DW1 stated D3 had been given licence by D1 to stay there. To the questions 'The company gave him the licence to occupy the premises' and 'Is that the licence to do whatever he wishes with the property as well, as long he not selling it' the answers by DW1 were 'yes' (p 70, NOP).

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The plaintiff's claims made to D1

[11] PW2 had given evidence it was agreed the plaintiff could claim the entire cost for the second project and some profit from D1. The plaintiff had

submitted its claim to D1 by letters dated 25 March 2004 (B2 1–25) and 16 August 2008 (B2 26–61) which were acknowledged receipt by the architect and QS of first project and 9 April 2008 (B 189–193) acknowledged receipt by D1. D1 did not deny or dispute the contents of the letters. DW2 had stated the claim in B2 1–25 as per letter dated 25 March 2004 was not processed as D1 had never appointed the plaintiff to carry out the renovation and the defendants did not reply to that letter. DW2 stated B2 1–2, 26 and 28 were sent to architect and QS for first project. Before any payment can be made the plaintiff has to send the documents to architect and QS for approval. As to whether architect and QS had denied defendants should not pay, DW2 answer was 'it wasn't mentioned in any of their claim that there was this amount outstanding for this project' (p 92, NOP).

[12] According to PW2 payments made by D1 for second project was RM200,000 on 13 April 2004 (B 144), another payment of RM200,000 on 1 August 2006 and RM138,276.78 on 11 August 2006. There were no receipts for the last two payments. The plaintiff had assumed the payments were for second project although there is no specific mention by the defendants. As stated in Q&A 19 this was because it was the practice of the defendants to pay by installments and not by invoices and when the plaintiff receives payment it was deducted according to the invoices sent. It was therefore assumed the payments were for second project. When the official receipt was sent there was no objection from D1. Only after the plaintiff demanded the outstanding amount for the projects did the defendants deny responsibility for second project and told the plaintiff to demand from D3. The defendants objections were made verbally at a meeting in 2010 and then by email dated 8 November 2010 (B 198). That email stated 'our management is not agreeable to the following invoices ... renovation works for Parkhouse Lot 27 & 28 amounting to RM538,276.78'.

[13] DW2 stated in the final account for first project (B 359–362) second project has not been taken into account as the renovation work was for D3 private residence and had nothing to with first project. The defendants had never agreed to pay for second project and had not paid RM200,000 for it. She does not recall receiving the receipt for that amount and that payment was for the other projects. In cross-examination as to whether the defendants objected to the renovation she stated they did not record it as part of the projects or amount due to the plaintiff; the defendants did not object initially but in 2010 and it took them six years to deny responsibility. She was also cross-examined when payment was made to the plaintiff whether it was specified for which project the payment was made she said 'sometimes yes sometimes no' and there is no document in the bundle to show where it is stated specifically the payment for which project. She disagreed she was aware of the receipt in B 144. In re-examination DW2 explained the plaintiff's claim not being denied from

2004–2010 in that they have not written formally to the plaintiff but have indicated they are not agreeable by not recording in the books and no payment was made for second project and the RM200,000 receipt was for some other project.

Analysis of evidence and finding

[14] The standing of D3 in the company as one who manages and runs the company, decision maker and practically the No 1 guy was such that any instruction from him would amount to coming from the defendants and binding on them. The fact of D3 being allowed to occupy Lot 27 and 28 by D1 shows it to be used by D3 in his capacity as chairman and director more so when D3 surrendered Lot 27 and 28 back to D1 upon his resignation on 10 October 2008.

[15] The evidence shows that the defendants were aware of D3's instructions to the plaintiff to renovate Lot 27 and 28 and never objected to it. The evidence of DW2 shows there was no demand in writing made to D3 for the renovation. They had taken on the responsibility for payment and only objected in 2010 which is a good six years after the instruction in 2004 and it came about after D3 left the company. When the plaintiff sent its claim to the defendants by letter dated 25 March 2004 they did not reply to say they were not processing the claim as D1 had never appointed the plaintiff to carry out the renovation work. The fact of the defendants not agreeing to the claim by not recording in their books is their internal procedure. DW2 confirmed the claims had been sent to the architect and QS. Further there was a receipt for payment issued by the plaintiff dated 13 April 2004 in B 144 for payment of RM200,000 made by the defendants in which is stated 'Payment No 1 for Datuk house, Lot 27 & 28, Serdang' which DW2 could only say she could not recall receiving the receipt and that payment was for other projects. PW2's evidence it was the practice of the defendants to pay by installments and not by invoices and when the plaintiff receives payment it was deducted according to the invoices sent and it was therefore assumed payments were for second project is preferred. This is when viewed in the light of DW2's evidence that when payment was made to the plaintiff it was sometimes specified and sometimes not specified for which project the payment was made and there is no document in the bundle to show where it is stated specifically the payment for which project. The issue of the plaintiff assuming such an arrangement as contended by the defendants does not therefore arise as there was a basis to it.

The law

[16] The above evidence thus shows it to be an appropriate case for the application of the rule in *Royal British Bank v Turquand* [1843-60] All ER Rep

435 where outsiders dealing in good faith with a company are not affected by any irregularities which may take place in the management of the company. Here is a situation where the plaintiff receives an instruction from D3 who is practically the No 1 guy or at the very least of very high rank, the chairman, a director and the person managing the company, the defendants knew of the renovation and never objected to it until after D3 had ceased to be in the company and even then two years after the resignation. Refer to *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 which followed *Turquand* under held (1):

> The rule in *Turquand* protects outsiders dealing with the company in good faith who are entitled to assume that acts within its constitution and powers have been properly performed and are not bound to inquire whether acts of internal management have been regular. The rule gives rise to an irrebuttable presumption, so that the company concerned is debarred from establishing or relying on the fact that the proceedings were irregular or unauthorised.

[17] The defendants had submitted the rule in *Turquand* does not apply as the plaintiff had acted imprudently in undertaking the renovation merely on D3's instructions. The projects were all by LAs except second project and this was the first time the plaintiff was doing work for D3. Being an experienced contractor of 40 years the actions of the plaintiff were not prudent and was an attempt to please D3 who had given him tens of millions of value of projects. However as explained by PW2 the lack of an LA was due to the fact the instruction to renovate was given two months from Chinese New Year ('CNY') in 2004 and D3 wanted to move in by CNY, the plaintiff was to expedite the work and formality to be waived. The instructions to renovate were from D3 and in PW2's mind he is the defendants representative because he is the one who gave the jobs for the projects. PW2 disagreed in order to keep the relationship with the defendants he was prepared to bend the rules and renovate the house without an LA or that he did do without lawful authority as he had received tens of millions of value of projects. This was therefore a proper instruction and the absence of an LA does not mean the plaintiff was not prudent such that the rule in *Turquand* cannot be invoked.

[18] The case of *Abdul Mohd Khalid bin Hj Ali & Ors v Dato' Hj Mustapha Kamal & Anor* [2002] MLJU 564; [2003] 5 CLJ 85 does not assist the defendants. The analogy from the aforesaid case that the defendants and D3 are separate legal personalities and the defendants cannot be liable for the personal arrangement between D3 and the plaintiff would only succeed if D3's instruction does not bind the defendants.

A WHETHER SUBUR LIABLE

[19] It was further contended by the defendants Subur should be held liable for the payment as the plaintiff had sent its claim to it. The evidence of PW2 is that the plaintiff had sent letters to Subur in B180–183 and 184–185 on the B defendants instructions; he didn't know why but he followed instructions hoping for payment at the soonest. The letter in B 184 states it was sent after a meeting with D1's representatives at D1's office. There were questions put to him that 2 persons mentioned in the letter of B 184 one Mr Chew and Mr Lai C were Subur's employees to which PW2 said he wouldn't know as they never represented themselves as being from Subur. To him they were from D1 as the meeting was held in D1. He had sent the bill to D1 and 'then the chop there asked us to change to another company'. The letters to D1 were in March 2004 and to Subur in January 2005. The evidence of DW1 was that Subur was under D D3's control and belonged to him but there were no documents to that effect. DW2 said Lai is not the defendants employee and works for Subur. She has no evidence on this.

[20] The evidence shows the plaintiff had been sending its claims first to D1 E which is consistent with its position that the defendants are liable and it was only when asked by the defendants to send the claim to Subur did it do so. There was otherwise no reason for it to do so. It is possible that the plaintiff didn't know the reason as it only wanted to be paid. There was no evidence that Subur belonged to D3 or that Lai was Subur's employee. In any event it was F PW2's evidence which the court accepts that Lai and Chew were D1's employees as there was never any representation from the both of them they worked for Subur and the meeting was held in D1's office. The letters to Subur without more does render Subur liable for the renovation work.

G INTEREST ON OUTSTANDING AMOUNT

[21] On the interest of 5% from 1 January 2010 PW2 stated in Q&A 23 the defendants had admitted to this in their para 34(a) of defence and by letter dated 20 October 2009 from D2 (B 194). In Q&A 41 DW2 does not appear H to dispute there was such an agreement to pay 5% interest but the interest charges were to cease on 30 June 2011 by virtue of an oral agreement between PW2 and Ds Mr TC Lee. DW2 referred to an email dated 3 April 2012 sent to a Ms Chee the finance manager from the plaintiff and that the plaintiff did not rebut or dispute it. In cross-examination she stated the ceasing of interest was I a verbal agreement and was to be included in the contra agreement which was not signed.

[22] The defendants were able to show the email address of Ms Chee was the one she had been using with PW2 and DW2 had been dealing with Ms Chee.

There was a verbal agreement that the interest charges would cease on 30 June 2011 which the defendants had followed up by email dated 3 April 2012 and there was no response from the plaintiff to dispute the fact of cessation of interest charges. However DW2 stated this term was to have been included in the contra agreement and they had computed up to that date. It was also PW2 and DW2 evidence the contra agreement was not signed due to a dispute about the second project cost not being included. This shows that in all probability the cessation of interest charges hinged on the contra agreement and since it was not signed the interest charges had not ceased.

[23] The claim on interest had been particularised in para 13 of amended statement of claim and para 8 of amended reply.

COUNTERCLAIM OF 12% INTEREST

[24] The basis for this is clearly provided in section 7.01 of S&P and therefore allowed.

CONCLUSION

[25] The plaintiff's claim of RM538,276.78 for outstanding amount on second project and interest of 5% on that amount from 1 January 2010 until the date of trial and thereafter 5% until the date of final settlement is allowed. The defendants alternative counterclaim in para 43(b)(ii) is allowed. Costs to the plaintiff.

Claim allowed.

Reported by Ashok Kumar